Supreme Court of the United States

October Term, 1954

No. 129

GEORGE W. DOLE, DONALD Q. McDONALD, and J. WESLEY CARLSON, doing business as BONDED TED SYSTEMS, and EUGENE DERRICK,

Appellants,

vs.

ORVILLE HODGE, Auditor of Public Accounts of the State of Illinois, LATHAM CASTLE, Attorney General of the State of Illinois, and JOHN GUTKNECHT, State's Attorney of Cook County, Illinois,

Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OPPOSING MOTION TO AFFIRM

John J. Yowell,
111 W. Washington Street,
Chicago 2, Illinois,
Of Counsel for Appellants.

Dated, July 13, 1955.

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STATEMENT

This suit is based upon the premise that the Fourteenth Amendment and the act of Congress passed pursuant thereto require that the federal courts be as zealous to protect the property rights of citizens, including the right to engage in a lawful business enterprise, as to protect their other civil rights.

The plaintiff Derrick, a druggist of Wheaton, Illinois, who formerly sold American Express money orders (Rec. 446), informed the defendant Hodge, the State Auditor, in writing, that under an agency agreement with the plaintiffs

Doud, McDonald and Carlson, a partnership doing business as Bondified Systems, he proposed to sell Bondified money orders in his drug store, the statute prohibiting such sales being, in his opinion, unconstitutional (plaintiffs' exhibit 23, Rec. 350). The answers expressly admit that the defendants threatened to enforce against the plaintiffs any violations of the Illinois Community Currency Exchanges Act and do not deny that any attempt by the plaintiffs to operate the business of selling and issuing money orders in drug, hardware and grocery stores will bring down upon the plaintiffs court action and criminal prosecution (Answers, par. VII, Rec. 40), and by reason of the statute and its threatened application to plaintiffs they have been unable to carry on the business of selling money orders in retail establishments in Illinois, and the partnership has appointed no other Illinois agents (Rec. 110).

Each day that the plaintiffs are prevented by the challenged statute and the defendants' threats to apply it to plaintiffs and to enforce it against them, they are being deprived of the right to conduct a lawful business and of the legitimate profits therefrom. Such losses cannot be recouped and they are irreparable. They are imminent and continuing. They are great and continually growing greater.

In the motion to affirm the judgment of dismissal for want of jurisdiction an abortive effort is made to show that the complaint should have been dismissed on the merits for want of equity, by misrepresenting the record.*

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* Instead of having a capital of only $38.00, the record actually shows that the plaintiff partnership has substantial operating capital—in a partnership operating account in a Chicago bank, $9,000.00 on the day suit was filed, $10,000.00 the following week (plaintiffs' exhibit 20, Rec. 349) and more than $4,000.00 at the time of the trial, twelve months later (Rec. 99); that from October 6, 1953 through October, 1954 the partnership maintained an average daily balance

The statute includes in the definition of a community currency exchange every person, firm, association, partnership or corporation engaged in the business of selling or issuing money orders (other than those excepted) (2a, 3a, Statement as to Jurisdiction); and prohibits the sale of money orders (other than those excepted) in any room with any other business, trade or profession, and in any room from which there is direct access to a room occupied by any other business, trade or profession (p. 10a, Statement as to Jurisdiction). There was no issue in the case, nor contention, that plaintiffs were not persons within the meaning of the Act, nor that the Act does not apply to the plaintiffs, but it was the position of the defendants that the Act does pro-

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* (Continued)
of more than $16,000.00 in a special account for the payment of money orders (Rec. 109), and that the balance in this account at the time of the trial was approximately $23,000.00 (Rec. 98); the adequacy of the partnership capital is demonstrated by the fact that in its first year of operation in a few counties in northern Indiana the partnership sold (and, of course, honored) more than $1,400,000.00 in money orders (Rec. 81, 103 104). The executive vice president of American Express Company testified that the Bondified system operates the same as the American Express method of selling money orders and in competition with it in various states (Rec. 469, 470) other than Illinois (where the statute gives American Express a monopoly in sales from retail stores); the record shows that in 1953 sales of Bondified money orders in the Detroit area exceeded $40,000,000.00 (Rec. 125). The maximum amount for which any one money order is issued either by plaintiffs or American Express is $100.00. The record further shows that at the time the challenged statute was enacted American Express Company's license to transact business in the State of Illinois had been forfeited for failure to file reports (Rec. 144). Thereafter, in 1945, American Express Company was incorporated in Illinois with an authorized capital of $1,000.00, its charter purposes being limited to the transmission of packages and parcels (Rec. 477). Sales of American Express Company money orders in Illinois are by an association of some 23,000 non-resident individuals, doing business as American Express Company (Rec. 495, 503).

hibit the plaintiffs from conducting their business in Illinois and that the defendants would proceed to apply the sanctions of the Act to the plaintiffs.

As stated in the dissenting opinion, "the application of the challenged statute to the plaintiffs is unquestioned and the Supreme Court of Illinois has already upheld the exemption of the American Express Company without suggesting that its decision in any way rested on the nature of the activities of the plaintiffs in the decided case. [*McDougall* v. *Lueder*, 389 Ill. 141 (1945)]."

ARGUMENT

I.

That prosecuting officers of the state have threatened, and, if not enjoined, will prosecute the plaintiffs unless they comply with an unconstitutional state law relating to their business, and withdrawal from further business until a test case is taken through the state courts and perhaps to this Court would result in a substantial loss of business for which no compensation could be obtained, shows the imminence of irreparable injury justifying the exercise of federal equity jurisdiction. *Toomer* v. *Witsell*, 334 U. S. 385; *Cline* v. *Frink Dairy Co.*, 274 U. S. 445; *Terrace* v. *Thompson*, 263 U. S. 197; *Packard* v. *Banton*, 264 U. S. 140; *Hygrade Provision Co.* v. *Sherman, et al.*, 266 U. S. 497; *Gibbs* v. *Buck*, 307 U. S. 66.

In *Toomer* v. *Witsell*, 334 U. S. 385, it was contended that injunctive relief was inappropriate since appellants failed to show the imminence of irreparable injury and did not come into court with clean hands. This Court said that defiance of the law would have carried with it the risk of heavy fines and imprisonment and that "withdrawal from further fishing until a test case had been taken through the South Carolina courts, and perhaps to this Court, would have resulted in a substantial loss of business for which no compensation could be obtained. Except as to the income tax statute, we conclude that appellants sufficiently showed the imminence of irreparable injury for which there was no plain, adequate and complete remedy at law."

In *Packard* v. *Banton*, 264 U. S. 140, the complaint averred that the defendants, prosecuting officers of the state, had

threatened, and if not enjoined, would proceed to prosecute the plaintiff unless he complied with a law alleged to be in contravention of the equal protection of the law clause of the Fourteenth Amendment. This Court, quoting from an earlier decision, said:

> "A distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when a prevention of such prosecutions is essential to the safeguarding of rights of property."

In *Gibbs v. Buck*, 307 U. S. 66, this court said, at page 77:

> "The damage before final judgment from the enforcement of the Act as shown by the affidavits would be irreparable. The allegations in the bill of threats of enforcement and the declaration in the affidavit of the attorney general of the state, the officer charged with supervision of enforcement, of readiness and willingness 'to prosecute any violations of said Act' sufficiently establish the immediate danger from enforcement."

The other cases above cited and many other decisions of this Court establish this exception to the general rule.

II.

The right to conduct a lawful business is a property right. All persons similarly circumstanced must be treated alike, and immunity granted to a class, however limited, having the effect to deprive another class of a personal or property right is a denial of equal protection of the laws to the latter class. *Truax v. Corrigan*, 257 U. S. 312; *Hays v. Missouri*, 120 U. S. 68; *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540; *Royster Guano Co. v. Virginia*, 253 U. S. 412; *Southern Railway Co. v. Greene*, 216 U. S. 400; *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550.

The District Court found that the plaintiff partnership is organized for the purpose of, intends to engage, and has

been engaging, exclusively in the business of selling and issuing money orders; that business is to be conducted through agents, principally persons engaged in operating retail drug, hardware and grocery stores; that American Express Company, which is exempt from the operations of the Act, is engaging in the same activity without a license issued under the Act, within the same limits in which plaintiffs wish to operate without being licensed; that American Express Company is an aggregation of individuals and not a corporation; that it sells and issues money orders in Illinois through operators of drug and grocery stores, does not operate under any franchise from the State of Illinois and is not subject to regulation by any regulatory body thereof. In its opinion the court stated that plaintiffs' contention means that plaintiffs' agent cannot sell and issue money orders as an adjunct to his drug store business, while an agent of American Express, its direct competitor, can do just that.

III.

> "Where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the federal constitution, and where the proper construction of the statute is a matter of grave doubt, this court will rest its decision on the Constitution. * * *"

Thompson v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55; *Sterling* v. *Constantin, et al.*, 287 U. S. 378; *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U. S. 426; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570.

Appellants reiterate that every material allegation of the amended complaint was either admitted or found as a fact by the court. It is significant that the motion to affirm, while denying this statement, fails to point out a single material allegation of the amended complaint that was neither admitted nor found as a fact by the court. It will also be noted

that the motion to affirm wholly fails to mention any of the decisions cited in the first paragraph of page 8 of the Statement as to Jurisdiction which, it is submitted, clearly indicate that the court erred (a) in denying the application for a permanent injunction, and (b) in holding that the federal courts have no jurisdiction of the cause.

Answering in order the seven numbered grounds for affirmance urged by appellees:

(1) In a decision binding upon all of the courts of the State of Illinois the Supreme Court of that State has held that exemption of American Express Company from the provisions of the Act does not render it unconstitional (*McDougall* v. *Lueder*, 389 Ill. 141, 151). The plaintiffs do not have a clear and adequate remedy in the state courts to prevent the great, imminent and irreparable losses that are daily accruing to the plaintiffs. Federal courts will *defer* action when there is an ambiguity or lack of clarity in a state statute, or doubt as to its proper interpretation or construction when such interpretation or construction might eliminate the federal question. Neither *Burford* v. *Sun Oil Co.*, 319 U. S. 315, nor *Alabama Commission* v. *Southern Railway Co.*, 341 U. S. 341, held that the federal court did not have jurisdiction, and in the latter case the court said that the *exercise* of its jurisdiction did not involve construction of a statute *so ill defined* that a federal court should hold the case pending definitive construction of that statute in the state courts.

(2) The record in this case shows that the danger of irreparable loss is both great and imminent. Of course, in either civil or criminal proceedings against them in the state courts appellants could assert the alleged unconstitutionality of the statute in the face of the decision by the Supreme Court of Illinois that it is constitutional,

but this would not give appellants the relief they seek, nor protect them against the continuing losses to which they are subject, nor constitute any special circumstances requiring the federal courts to stay action pending such proceedings. In *Douglas* v. *Jeannette*, 319 U. S. 157 the court did not hold that the District Court had no jurisdiction. In *Watson, et al.* v. *Buck, et al.*, 313 U. S. 387, there were no threats to enforce the law and no danger of irreparable loss.

(3) There is no issue, nor any question, that the prohibition of the challenged statute extends to all persons, firms and corporations, including plaintiffs, and there is no ambiguity or lack of clarity in this respect. The Supreme Court of Illinois has held the Act and the exemption valid, and further held that "the General Assembly would surely never have passed the Act if they had thought the said companies would be made subject to its rules and regulations". The Supreme Court of Illinois thus found that the exemption provisions were not severable, which also distinguishes the case from *Watson, et al.* v. *Buck, et al.*, 313 U. S. 387; *Douglas* v. *Jeannette*, 319 U. S. 157; *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101; *Federation of Labor* v. *McAdory*, 325 U. S. 450, and *C. I. O.* v. *McAdory*, 325 U. S. 472. In the latter case this Court did not have jurisdiction to review the State Supreme Court decision in the case because the question as to constitutionality had not been properly presented to the state court. That does not mean that the jurisdiction of a federal district court is dependent upon a previous presentation of the constitutional question to the state court.

(4) *Public Service Commission* v. *Wycoff*, 344 U. S. 237, involved a declaratory judgment proceeding before

a single district court judge, in which the plaintiff abandoned any attempt to obtain an injunction because it wished to avoid the requirement of three judges and the necessity of proof of threatened prosecution. In *Stainback v. Mo-Hock, etc.*, 336 U. S. 368 the plaintiffs were not seeking to prevent continuing losses from being unable to carry on a lawful business, but without showing any danger of loss attacked a Hawaii statute which carried no criminal penalties for infractions, which was not clear as to its application to certain schools and teachers and which had not been construed by the Hawaiian courts.

(5) The Supreme Court of Illinois has already held that the challenged Act would not have been passed without the exemption and it must follow that the exemption is not severable.

Liggett v. Lee, 288 U. S. 517, was an appeal from the Supreme Court of Florida which had affirmed a judgment dismissing a suit to enjoin the enforcement of a Florida statute relating to chain stores. This Court reversed and remanded the cause for further proceedings since it did not appear whether the Florida court had held valid the section attacked or whether it held it invalid but that the section was severable. If the later, of course no Fourteenth Amendment question was involved.

In *Dorchy v. Kansas*, 264 U. S. 286, a writ of error was sought to the Supreme Court of Kansas. This court held that the decision of the state court as to the severability of a provision is conclusive upon the Supreme Court; that while a decision of the state court as to severability of a provision is conclusive upon the Supreme Court, if there is no controlling state court decision in cases coming from the lower federal courts such questions of severability must be determined by the Supreme Court.

American Express Company in Illinois; that the American Express Company does not operate under any franchise granted by the State of Illinois and is not subject to regulation by any regulatory body in the State of Illinois (Rec. 16, 17); that it is discriminatory to require the plaintiffs and their agents to pay substantial annual license fees for licences, to submit and pay for periodic investigations and to prohibit their agents from selling or issuing money orders in conjunction with the maintenance of any other business when at the same time American Express Company, in an operation not different from those contemplated by plaintiffs, is exempt from all such annual fees and from the necessity of complying with the other regulations embodied in the statute and its agents are permitted to engage in such other vocations as they see fit (Rec. 17).

It was further alleged (Rec. 18) and admitted in the answer (Rec. 29) that the defendants have threatened that any attempt by the plaintiffs to operate the business of selling and issuing money orders under their firm name, or through offices wholly owned and operated by them or by means of drug, hardware and grocery stores as agents of the plaintiffs, or by both such means, will bring down upon plaintiffs actions by said defendants in the courts of the State to prevent such continuance of such business and for the enforcement of the provisions of the Act by criminal prosecution; that to comply with the provisions of the statute in order to sell plaintiffs' money orders plaintiffs' agents will be required to qualify as currency exchanges; that it will be necessary for the plaintiffs to pay to the Auditor of Public Accounts the inspection and license fees required by the Act with respect to each agent and place of business. (Rec. 19).

and the court referred to *Myers v. Anderson*, 238 U. S. 368, 381, and *Louisville & Nashville R.R. v. Garrett*, 231 U. S. 298, 311; that in cases coming from the state courts this Court may decide also the question of severability, but is not obliged to do so. In the *Dorchy* case the state court not having passed upon the question of severability, and it having come from that court, its judgment affirming a conviction under the challenged statute was reversed and ordered vacated in order that the state court might pass upon the question of severability.

(6) There is no basis in this record for any contention that appellants came into equity with unclean hands; nor for the application of *Ford v. Caspers*, 124 Fed. 2d 884, in which the court found that the parties were *in pari delicto*.

(7) In *Railroad Commission v. Pullman Co.*, 312 U. S. 496, this court said that the meaning of the statute was far from clear and what practices were subject to the Commission's correction equally doubtful.

None of the cases cited in the motion to affirm involved the immediate, imminent and irreparable losses incident to the cessation of a lawful business enterprise. In this case the court found as a fact that the amount in controversy, that is the value of the plaintiffs' right to carry on their business without the interference of the defendants, exceeds the sum of $3,000.00.

CONCLUSION.

One of the district judges dissenting stated that he was aware of no decision in which this Court has held that a federal district court must, or even should, refuse to entertain a suit under the circumstances present here. The majority opinion cites no such decision; none is cited in the motion to affirm, and we have found no such case. If one could be found it would be contrary to the teachings of this Court's decisions.

As stated by Judge Lindley in *Currency Services, Inc. v. Matthews*, 99 Fed. Suppl. 40.

> "It is the inclusion, in the definition of the term 'community currency exchange' of one who, though not engaged in the check-cashing business ordinarily designated by that term, is 'engaged in the business of selling or issuing money orders', coupled with the exemption of a company engaged in that very business, which, it seems to us, renders the statute discriminatory and unconstitutional *as applied to the plaintiff corporation, or to any other person or firm engaged in the business of selling or issuing money orders but not in the ordinary business of a currency exchange.*"

It is submitted that this appeal presents substantial federal questions; that it is meritorious in that the decree and opinion are based upon a misconception of the decisions of this Court; that the motion should be denied and that the case should have plenary consideration.

Respectfully submitted,

JOHN J. YOWELL,
111 W. Washington Street,
Chicago 2, Illinois,
Attorney for Appellants.